

**Rest Haven Living Center, Inc., d/b/a Rest Haven
Nursing Home and Local 100, Service Employ-
ees International Union, AFL-CIO, Petitioner.
Case 15-RC-7940**

September 26, 1996

**DECISION ON REVIEW AND DIRECTION OF
ELECTION**

**BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND FOX**

On August 31, 1995, the Acting Regional Director for Region 15 issued a Decision and Order finding that the Employer's full-time and part-time licensed practical nurses (LPNs) are statutory supervisors. He therefore dismissed the petition in which the Petitioner sought to represent the LPNs. In accord with Section 102.67 of the National Labor Relations Board's Rules and Regulations, the Petitioner filed a timely request for review and the Employer filed a statement of opposition. By Order dated October 30, 1995, the Board granted review with respect to the LPNs whose supervisory status is in dispute. The Employer filed a brief on review.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully reviewed the entire record in this proceeding, the Board has decided to reverse the Acting Regional Director's decision that the LPNs are statutory supervisors. We find that the Acting Regional Director's decision is inconsistent with the Board's decision in *Ten Broeck Commons*, 320 NLRB 806 (1996). In that case, the Board found that LPNs, whose duties were similar to those of the LPNs at issue here, were not statutory supervisors. We find, contrary to the Employer, that its LPNs do not exercise 2(11) supervisory authority with respect to directing the work of certified nursing assistants (CNAs), assigning and transferring CNAs, or disciplining CNAs.

The Employer operates a 205-bed nursing home in Bogalusa, Louisiana. The Petitioner seeks to represent the LPNs in the Employer's nursing department. The nursing department has four supervisors: Ivy Hill, the director of nursing (DON); and three LPNs who are stipulated supervisors—Carolyn Peters, the resident service director; Pat Cooper, the infection control nurse; and Betty Flynn, whose title is administrative assistant. There are also 15 full-time and 6 part-time LPNs, 3 aide coordinators (ACs), and approximately 45 certified nursing assistants (CNAs). The LPNs work 12-hour shifts, rotating at 6:30 a.m. and 6:30 p.m. The CNAs work 8-hour shifts. There are five LPNs on the day shift and three LPNs on the night shift. CNAs out-

number LPNs at all times.¹ However, there is always an AC present on each of the CNAs' three shifts. The AC monitors the CNAs by posting their schedules and seeing that they have their supplies. The LPNs and CNAs work in teams assigned to the five stations on the day shift and the three stations on the night shift.

The term "supervisor" is defined in Section 2(11) of the Act as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet this definition, a person needs to possess only one of the specific criteria listed, or the authority to effectively recommend, so long as the performance of that function is not routine but requires the use of independent judgment. Of the supervisory indicia listed in Section 2(11), the Employer claims that its LPNs are statutory supervisors because they have the requisite authority with respect to direction, assignment, transfer, and discipline of employees.

We find, contrary to the Employer, that the LPNs' direction of the work of CNAs is merely routine and does not involve independent judgment. LPNs Sharon Kelley and Auntranette Sartin both testified that approximately 90 percent of their job consisted of caring for the residents of the nursing home. As Kelley stated: "If [the residents] need any care, I tend to those needs for the residents." She described her duties as giving medicines, wound care, treatments, procedures, suctioning, respiratory care, diabetics, and "anything that pertains to health and wellbeing." Kelley acknowledged that if a CNA failed to perform part of her regular duties, such as taking the residents' blood pressure, she would direct the CNA to do so. Also, in an emergency, such as the precipitous sickness of a patient, she would direct CNAs to get the patient "cleaned up and bathed and ready to go to the hospital."² She might also request that CNAs take temperatures and blood pressure in such an emergency.

¹ There are approximately 18 to 20 CNAs on the morning shift, 13 to 16 CNAs on the evening shift, and 10 to 14 CNAs on the night shift.

² Administrator Herring testified that LPNs consult with the patient's physician if the LPN determines that there is an emergency requiring a hospital stay for the patient. The physician is responsible for the decision about a hospital stay. In an emergency where there is no time to consult the physician before sending the patient to the hospital, such as a patient having a heart attack, the LPN must notify the physician as soon as possible.

Kelley emphasized that in these situations, "we just all work together."³

Similarly, Sartin testified that CNAs are responsible for "changing the residents and making sure that their linens and clothes aren't soiled, [taking] them to the bathroom." Nevertheless, when Sartin discovers a resident with soiled linens, she asks the responsible CNA to help her change the linens while also asking why the linens were not previously changed. Sartin also testified that CNAs are responsible for feeding residents who are unable to feed themselves. Sartin will therefore remind a CNA of her responsibility should Sartin notice that a resident has not been fed.

LPNs and CNAs have one primary function—taking care of elderly people who are no longer able to care for themselves. In performing this function, LPNs and CNAs engage in duties which require little skill and, are essentially repetitive.⁴ Moreover, the LPNs' directives to CNAs are narrowly circumscribed and involve giving general, routine directions to lesser skilled employees consistent with established employer policies in order to maintain the quality of care. If an LPN sees a patient that needs attention or a job that has not been properly done, the LPN will call it to the attention of the CNA. In emergencies, LPNs and CNAs work together to ensure that the sick resident receives the best possible care. As we concluded in *Ten Broeck Commons*, supra, this type of direction does not involve the independent judgment required by Section 2(11).⁵

We similarly conclude that the LPNs do not exercise independent judgment in making assignments or transferring employees. The record shows that the ACs do all scheduling for the CNAs and that LPNs routinely consult with the DON when dealing with "no-shows" and requesting CNAs to work overtime. Kelley testified that she was once unable to reach the DON and had to take responsibility for authorizing overtime. Nevertheless, Kelley still had to write "an absentee list that says, no call, no show" and turn it into the director of nurses' office. LPN Grace Jenkins testified that with respect to a "problem" requiring "extra help immediately," she could summon CNAs from another station, but provided no such situations or the frequency of their occurrence.

Based on the above, we find that LPN assignment of CNAs is routine. Any overtime assigned by LPNs to CNAs must be cleared with the DON in advance, and if the DON is unavailable, sanctioned by the DON subsequently. Any reassignment of CNAs by LPNs

while all are on duty occurs on an emergency basis only.⁶ We find no 2(11) independent judgment here.

Nor do we find that the LPNs' involvement in discipline renders them supervisors within the meaning of Section 2(11). Both Kelley and Sartin testified that all employees have the authority to report problems. Employees fill out the Employer's "Date of Occurrence" and "Nature of Problem" report. Certainly LPNs have reported CNAs. LPNs testified about reporting the following incidents: a CNA sat down before her work was completed and then cursed the AC because the AC told the CNA that she must complete her work first; a CNA verbally abused a resident; a CNA left the nursing home for more than 1-1/2 hours of her shift; a CNA failed to perform her routine patient blood pressure checks, or failed to feed her patients, or left them soiled; and a CNA failed to promptly heed an LPN's notification that a resident needed help because the resident's leg was caught in the side rail of his bed. These incident reports contain no recommendations and were given to the DON to investigate and decide what action, if any, to take against the employee.

LPN Diane Tagert testified that on one occasion she sent CNA Gwen Holmes home; but only after being instructed to do so by the DON. According to Tagert, Holmes was verbally abusing a resident and refused to heed Tagert's advice to calm down. Tagert called the DON who told Tagert to send the CNA home and tell her to report to the DON before returning to work. Tagert followed the DON's instructions, but Holmes refused to leave. The DON then called Tagert to check on the situation and told Tagert to call the police if the CNA still refused to leave. The CNA left before Tagert had to resort to summoning the police.⁷

There are also incidents involving LPNs who reported employees from departments other than the nursing department. LPN Jenkins testified that she once wrote up a maintenance employee because he was a "no-show" after a telephone call. Finally, em-

⁶The Employer asserts that LPN Jenkins' testimony and LPN Kelley's testimony about how she may summon CNAs to help in an emergency shows that LPNs exercise 2(11) transfer authority. We find no such record evidence. The LPNs' practice of seeking assistance from CNAs in emergencies is merely routine direction in accordance with established company policies. It does not amount to the authority to transfer employees.

⁷The Employer asserts that Tagert's written report of the incident shows that Tagert sent Holmes home on her own authority. The Employer cites this statement: "I then told [Holmes] to punch out and not return to work before seeing [the DON]." We disagree with the Employer. Tagert's testimony was that she sent Holmes home after she was told to do so by the DON, and the written report does not contradict that testimony.

In this respect we also note that LPN Jenkins testified that she sent CNAs home four or five times. However, Jenkins provided no details and the Employer entered no documentary evidence that could have supplied specificity. In these circumstances, we find the Employer has failed to show that the LPNs discipline other employees.

³ Kelley testified that on some nights, emergencies never arise; on other nights, there may be one, two, or three such occurrences.

⁴ See *Ten Broeck Commons*, supra.

⁵ Id.

ployees from departments other than the nursing department, and CNAs themselves, also can write up LPNs. LPN Sartin testified that on one occasion a CNA wrote her up because she had her head down on a desk, and on another occasion, a maintenance employee wrote her up because she was away from her station. On both occasions, Sartin was counseled by the DON and warned that she would be disciplined if the behavior recurred.

It is clear from this record that LPNs, like all the Employer's employees, have the authority to write up incidents involving fellow employees on forms which may be retained in employees' personnel files. However, it is the DON, or some other managerial/supervisory person who investigates and decides what, if any, discipline is warranted.⁸ LPNs do not hire, fire, or discipline other employees, or make recommendations about the discipline of employees. In-

⁸ LPN Jenkins testified she had made recommendations that employees be terminated on five occasions in approximately 18 years. She claimed that these employees had indeed been terminated, including the CNA she wrote up for leaving her station for more than 1-1/2 hours. Jenkins provided no details about the other four incidents of her recommendations to terminate employees and the Employer entered no documentary evidence to support Jenkins' claim. The five other LPNs who testified at the hearing denied having the authority to recommend discipline of another employee and made no claims that they had ever done so.

deed, as Tagert testified, when she encountered a CNA verbally abusing a resident, she consulted the DON throughout the incident and only sent the CNA home under direction from the DON. As we stated in *Ten Broeck Commons*, supra, the Board has found that employees are not supervisors where they merely report incidents of unacceptable work performance or behavior and make no recommendations with respect to discipline.⁹

Based on the above, we find the Employer's LPNs are not supervisors within the meaning of Section 2(11) of the Act.¹⁰

ORDER

The petition in Case 15-RC-7940 is reinstated.
[Direction of Election omitted from publication.]

⁹ *Ten Broeck Commons*, supra.

¹⁰ The Employer contends that there are several "secondary indicia" of LPN supervisory authority. First, the Employer claims that the ratio of supervisors to supervised employees is suspect unless LPNs are supervisors. However, the Employer cites only the DON as the supervisor of the nursing department, ignoring the three LPNs stipulated to be supervisors by the parties. Second, the other indicia cited by the Employer—differences in wages and benefits between LPNs and CNAs and management staff meetings attended by LPNs but not CNAs—fail to surmount the record evidence discussed above. Moreover, the Employer's argument does not take into account nonsupervisory distinctions in their status. The LPNs have a different educational background, greater skills, and different duties.